

RE LOW KOK TUAN
EX P ARAB-MALAYSIAN MERCHANT BANK BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[BANKRUPTCY NO: 29-2049-94]
14 OCTOBER 1996

CIVIL PROCEDURE: Appeal - Appeal from Registrar - Stay of proceedings - Bankruptcy, stay of creditor's petition for - No notice of appeal filed - Whether stay can be granted - Time - Bankruptcy Rules 1969, rr. 89 & 279 - Rules of the High Court 1980, O. 56 r. 3 - Whether can appeal against stay - Rules of the High Court 1980, O. 55 r. 12 - Rules of procedure - Observance of

BANKRUPTCY: Petition - Creditor's petition - Application for stay pending appeal against decision of Registrar - No notice of appeal filed - Adjudication Order and Receiving Order granted - Legal capacity of bankrupt to appeal - Bankruptcy Act 1967, ss. 38(1)(a), 92(1) & 105(1)

CIVIL PROCEDURE: Stay of execution - Application for - Refusal by Deputy Registrar - Whether can go before judge - Whether can be by way of appeal - Whether must be by way of fresh application

The present case comprised of three notices of appeal, ie, encl. 18, 16 and 17 for hearing before the court. By consent of the parties, these three notices of appeal were heard together and submissions made only in respect of encl. 17, on which any order of the court would also apply to the other two enclosures.

By encl. 13 the appellant applied to the Deputy Registrar for a stay of the creditor's petition against the appellant pending the final disposal of an appeal to the Judge in Chambers to be filed against the decision of the Registrar made on 16 April 1996 ('the 16 April decision'). The Deputy Registrar refused to grant a stay of the creditor's petition and dismissed the appellant's application. The creditor's petition was then heard and an Adjudication Order and Receiving Order ('AO & RO') were made against the appellant.

Enclosure 17 was an appeal against this decision of the Deputy Registrar who refused to grant a stay of the creditor's petition. As at the date of granting the AO & RO, no appeal had been lodged by the appellant against the 16 April decision.

- a* The issues before the Court were as follows:
- i*) By virtue of the fact that the appellant had already been adjudged a bankrupt, whether the appellant had the legal capacity to appeal against the decision of the learned Deputy Registrar?
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 - ii*) Assuming that the appellant had the legal capacity, whether there could be a stay in the absence of an appeal against the 16 April decision?
 - iii*) What would be the effect of rr. 89 and 276 of the Bankruptcy Rules 1969 ('the BR') on the case?
 - c*
 - iv*) Whether there is any provision in law for a party to appeal against an order refusing a stay?

Held:

- d* [1] The principle established in *Re Khoo Kim Hock* would not apply to the facts of the present case. Enclosure 17 herein and, for that matter, encl. 13, were not applications seeking an order to annul bankruptcy orders under s. 92(1) and 105(1) of the Bankruptcy Act 1967. They were applications for a stay of the bankruptcy order and all ancillary and related proceedings. The appellant in the present case lacked the legal capacity to lodge this appeal against the decision of the Deputy Registrar.
- e*
- f* [2] There has to be a proper and valid appeal pending in the court, before an application for stay can be considered. In the present case there was no appeal whatsoever against the 16 April decision when encl. 13 came up for hearing and that position persisted until the present moment. The application for stay was therefore premature and ill-conceived and the Deputy Registrar was absolutely right in dismissing the application.
- g* [3] The expression an appeal "from the High Court" found in r. 89 of the BR is a reference to an appeal from the decision of the High Court to an appellate tribunal higher than the High Court. This means an appeal from the High Court to the Court of Appeal. In the instant case the court was only concerned with an appeal from the decision of a Deputy Registrar of the High Court to the Judge in Chambers of the High Court. Therefore, the express provision of r. 89 had no application to the present case. Rule 276 incorporates the provisions of the Rules of the High Court 1980 ('the RHC') *mutatis mutandis* to bankruptcy matters, where no other provision relating to the matter is to be found in the Bankruptcy Rules 1969. Apart from r. 89, which was not applicable to the facts herein, there is no other provision in the Bankruptcy Rules dealing with an appeal from a Registrar to a Judge in Chambers in respect of a decision given by the
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Registrar under the Registrar's bankruptcy jurisdiction. Therefore O. 56 of the RHC shall apply *mutatis mutandis*. Pursuant to O. 56 r. 3 of the RHC it would be incumbent upon the appellant to file a notice of appeal within the 5-day time frame if he wished to file an appeal against the 16 April decision. Since there was no such appeal when encl. 13 came up for hearing and until now there was still none, the appellant was clearly out of time to lodge an appeal. Therefore, encl 17 was frivolous and ought to be dismissed. a
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[4] Order 55 r. 12 of the RHC makes a specific reference to "Court appealed from." The definition provisions of the RHC under O. 4 r. 2 defines the expression "Court" to include the Registrar. Accordingly, a party wishing to seek an order for stay from a decision given by the Deputy Registrar must in the first instance go before the Deputy Registrar and if he fails to get a stay there, then he may come before the judge by way of a fresh application for a stay and not by way of an appeal. Enclosure 17 was not asking for a stay but was an appeal against a decision given by the Deputy Registrar refusing a stay. The purported appeal *vide* encl. 17 was therefore misconceived on this ground. c
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[Appellant's appeal in encl. 17 dismissed with costs.]

Cases referred to:

Re Khoo Kim Hock [1974] 2 MLJ 29 (*refd*)
SA Andavan v. Registrar Of Titles Negeri Sembilan & Ors [1977] 2 MLJ 220 (*cit*)
Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 (*refd*) e

Legislation referred to:

Bankruptcy Act 1967, ss. 38(1)(a), 92(1), 105(1)
Bankruptcy Rules 1969, rr. 89, 276
Courts of Judicature Act 1964, s. 67
Rules of the High Court 1980, O. 4 rr. 2, O. 55 r. 12, O. 56 rr. 1, 2, 3 f

For the judgment debtor - Selva Ponniah; M/s Husin Selva & Partners g
For the judgment creditor - N Chandran (Pushpa Menon with him); M/s Adnan Sundra & Low
For the Official Assignee - Hj Sharifuddin, Deputy Official Assignee

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*a***JUDGMENT****Low Hop Bing J:*****3 Notices Of Appeal To Judge In Chambers****b*

Before me are the following Notices of Appeal for hearing and determination.

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1. "Notice of Appeal to Judge in Chambers" in Bankruptcy No. 29-2049-94 – Encl. (18);
2. "Notice of Appeal to Judge in Chambers" in Bankruptcy No. 29-2049-94 – Encl. (16);
3. "Notice of Appeal to Judge in Chambers" in Bankruptcy No. 29-2049-94 – Encl. (17).

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By consent of the parties herein, these 3 Notices are heard together and submissions will only be made in respect of Encl. (17), on which any order made by me will also apply to Encls. (16) and (18).

Appellant's Legal Capacity To Appeal In Encl. (17)*e*

Enclosure (17) is simply an appeal against the decision given by the learned Deputy Registrar on 8 May 1996, in which she had, on the appellant's application in Encl. (13), refused to grant a stay of the Creditor's Petition and all related and ancillary orders [Encl. (4)].

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In Encl. (13), the appellant had prayed for a stay of the Creditor's Petition and all ancillary and related proceedings, "pending the final disposal of the appeal to the Judge in Chambers to be filed against the decision of the learned Registrar made on 16 April 1996."

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On 7 May 1996, the appellant filed a Summons-in-Chambers [Encl. (15)] asking for, *inter alia*, the Creditor's Petition and all ancillary and related proceedings to be stayed pending the final disposal of the Appeal to the judge in Chambers to be filed against the decision of the Registrar made on 16 April 1996. Enclosure (15) was heard and dismissed on 8 May 1996. The Creditor's Petition in Encl. (4) was heard on the same date ie, on 8 May 1996 and an Adjudication Order and Receiving Order (collectively referred to as "bankruptcy orders") were made.

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As at 8 May 1996, no appeal had been lodged against the decision of the Deputy Registrar made on 16 April 1996.

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Based on the fact that on 8 May 1996, the appellant had already been adjudged a bankrupt, learned counsel for the respondent submitted that as from 8 May 1996, the appellant ceased to have legal capacity. It was however contended for the appellant that notwithstanding the bankruptcy orders made against the appellant on 8 May 1996, the appellant on the strength of the principle enunciated in *Re Khoo Kim Hock* [1974] 2 MLJ 29 still enjoys legal capacity.

In my judgment, it is trite law that upon a person being adjudged a bankrupt, all his affairs become vested in the Official Assignee: Section 38(1)(a), Bankruptcy Act 1967 ('the Act'). This prohibition no doubt excludes an application by an undischarged bankrupt seeking an order of the court under ss. 92(1) and 105(1) of the Act to review, rescind or vary any order made by it: *Re Khoo Kim Hock supra*. The question before me is whether the principle in *Re Khoo Kim Hock supra*, applies to the facts of the instant case. *Re Khoo Kim Hock supra* revolves around an undischarged bankrupt's application to annul bankruptcy orders under ss. 92(1) and 105(1) of the Act. A quick look at the headnote of that case is sufficient to demonstrate that it has absolutely no application to the facts of the instant case. Enclosure (17) herein and, for that matter, Encl. (13) are not applications seeking an order to annul bankruptcy orders, but are applications for a stay of the bankruptcy orders and all ancillary and related proceedings. Accordingly, *Re Khoo Kim Hock* is of no assistance to the appellant in Encl. (17). That being the case, I hold that the appellant lacks the legal capacity to lodge this appeal against the decision of the Deputy Registrar who has refused the appellant's application for stay of the Creditor's Petition and all ancillary and related proceedings.

Merits Of This Appeal

1. Can There Be A Stay In The Absence Of An Appeal?

Assuming that I was wrong in holding that the appellant lacks the legal capacity to lodge this appeal and assuming that the appellant has the necessary legal capacity, I shall now proceed to consider and determine this appeal on its merits.

It was submitted on behalf of the respondent that a stay cannot be granted in a vacuum. Before there can be a stay of bankruptcy orders, there must first of all be an appeal against the bankruptcy orders. Where there is no appeal pending, it is axiomatic that there can be no stay.

The appellant contends that since there is a proper appeal pending before this court against the Deputy Registrar's decision, the court may grant a stay of the bankruptcy orders.

- a* In my judgment, I hold that there has to be a proper and valid appeal pending in the court, before an application for stay may be considered. Here on the facts before me, it is eminently clear that there was no appeal whatsoever against the decision of the Registrar given on 16 April 1996 when Encl. (13) came up for hearing and that position still obtains until the present moment.
- b* Since no appeal lies against the decision of the Deputy Registrar given on 16 April 1996, the application for stay is premature and ill-conceived.

- Order 56 r. 1 of RHC 1980 provides for an appeal to a Judge in Chambers from any judgment, order or decision of the Registrar. Order 56 r. 2 states in what form an appeal from the Registrar to the Judge in Chambers should take.
- c* Then O. 56 r. 3 stipulates that the Notice of Appeal from the Registrar to the Judge in Chambers must be issued within five days after the judgment or decision appealed against. On the facts before me, it is to be observed that the appellant has not complied with the provisions of O. 56 r. 3 in that no Notice of Appeal against the decision in Encl. (13) has been filed within the
- d* 5-day period.

In my view, the learned Deputy Registrar was, in the circumstances, absolutely right in dismissing the application for a stay of the bankruptcy orders.

Effect Of r. 89 And r. 276 Of The Bankruptcy Rules 1969

- e* Learned counsel for the appellant says that r. 89 of the Bankruptcy Rules 1969 applies to an appeal lodged against a decision of the Deputy Registrar in the exercise of bankruptcy jurisdiction. The respondent retorted and opined that the view of the appellant's counsel is a fallacy and does not reflect the true scope and purport of r. 89.
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For the purpose of fully appreciating the effect of r. 89, it is necessary to reproduce it as follows:

89. Appeals.

- g* The provisions and procedure for the time being in force respecting appeals from the High Court in its ordinary civil jurisdiction shall apply to appeals in bankruptcy with the following modifications:
- (a) The Official Assignee shall not be required to give security for costs;
- h* (b) The time for entering the appeal and serving notice thereof on the respondent shall be fourteen days from the date of signing, entering or otherwise perfecting the judgment or order appealed from;
- (c) No appeal shall operate as a stay of proceedings under the judgment or order appealed from unless the Court otherwise directs.

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It is my view that r. 89 deals specifically with the application of the provisions and procedures for the time being in force respecting appeals from the High Court in its ordinary jurisdiction to appeals in bankruptcy. In other words, for appeals in bankruptcy provisions and procedures for civil appeals from the High Court would apply with necessary modifications. Appeals from the High Court would go to the Court of Appeal: Section 67 Courts of Judicature Act 1964. In the instant case, we are not concerned with an appeal from the High Court to the Court of Appeal. We are only concerned with an appeal from the decision of a Deputy Registrar of the High Court to the Judge in Chambers of the High Court. Therefore the express provision of r. 89 has no application to the hearing of this proceeding. In my judgment, an appeal “from the High Court” is a reference to an appeal from the decision of the High Court to an appellate tribunal higher than the High Court. In the present context, this would mean an appeal from the High Court to the Court of Appeal, as stated above.

Rule 276 of the Bankruptcy Rules 1989 provides that in the absence of any rule regulating any proceeding under the Bankruptcy Act 1967 or Bankruptcy Rules 1969, the Rules of the High Court shall apply, *mutatis mutandis*. Rule 276 incorporates the provisions of the Rules of the High Court *mutatis mutandis* to bankruptcy matters, where no other provision relating to the matter is to be found in the Bankruptcy Rules 1969. Apart from r. 89, which as alluded to above, is inapplicable to the facts herein, there is no other provision in the Bankruptcy Rules dealing with an appeal from the Registrar to a Judge in Chambers, in respect of a decision given by the Registrar under the Registrar’s bankruptcy jurisdiction. It must therefore follow that by virtue of r. 276, the provisions of the Rules of the High Court relating to appeals from the Registrar to the Judge in Chambers ie, O. 56 shall apply *mutatis mutandis*. In the circumstances, I am of the view that it is incumbent upon the appellant to file a Notice of Appeal within the 5-day time frame stipulated in O. 56 r. 3, if he wished to file an appeal against the decision of the Deputy Registrar given on 16 April 1996. There was no such appeal when Encl. (13) came up for hearing and until now there is still none. The position is also clear that the appellant as the party aggrieved by the Deputy Registrar’s decision given on 16 April 1996 is clearly out of time to lodge an appeal. Therefore, Encl. (17) is frivolous and ought to be dismissed with costs.

Can There Be An Appeal Against A Refusal To Grant Stay?

Enclosure (17) is in effect an appeal against the decision of the learned Registrar refusing a stay. The fundamental question which requires consideration and determination by the court is whether there is any provision in the law for a party to appeal against an order refusing a stay?

- a* It is the submission of the respondent that no law exists for a party to appeal against an order refusing a stay. The appellant, on the other hand, replied by referring to O. 56 r. 1 of the Rules of the High Court which provides that “An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.
- b* In my opinion, the provisions relating to an application for a stay are only too well known. Simply to recapitulate the position here, what is required by the law is for the party seeking a stay, at the first instance to apply to the presiding officer who made the order against which the party is appealing and if he fails to get the stay there, he should then apply afresh seeking the stay
- c* before an appellate court. This position in law is implicit upon the reading of O. 55 r. 12 of the Rules of the High Court which is reproduced below:

An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the **Court appealed from the High Court may order**, and an application for stay shall be made in the first instance to the

d Court appealed from.

- Here, what Encl. (17) is doing is not asking for a stay but to appeal against a decision given by the Deputy Registrar refusing a stay. The purported appeal *vide* Encl. (17) is therefore misconceived on this ground. Here it is relevant
- e* to observe that O. 55 r. 12 makes a specific reference to “Court appealed from.” The definition provision of the Rules of the High Court under O. 4 r. 2 defines the expression “Court” to include the Registrar. Accordingly, a party wishing to seek an order for stay from a decision given by the Deputy Registrar must in the first instance go before the Deputy Registrar and if fails
- f* to get a stay there, then he may come before the judge by way of a fresh application for a stay and not by way of an appeal.

Compliance With Rules Of Court

- The need for parties to comply with the rules of procedures has been reiterated by our courts time and again. Members of the Bar who are retained in litigation are reasonably expected to strictly adhere to the rules of procedures. *S.A Andavan v. Registrar Of Titles Negeri Sembilan & Ors* [1977] 2 MLJ 220. In *Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420, Mohd Eusoff bin Chin (now Chief Justice of the Federal
- g* Court) in delivering the judgment of the then Supreme Court observed that failure to comply with the rules of court will lead to chaos in the conduct of litigation.
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Conclusion

By reason of the above grounds, I dismiss the appellant's appeal in Encl. (17) with costs. As stated above, by consent of the parties herein, the order made herein applies to Encls. (16) and (18) as well.

Reported by Ling Hea Hoon

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